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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 766.

EDWARD K. BARSKY, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

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Edward Dmytryk,
Adrian Scott,
Ring Lardner, Jr.,
Lester Cole.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

This application for leave to file a brief as amici curiae in the above entitled proceeding is made on behalf of the following persons, John Howard Lawson, Dalton Trumbo, Albert Maltz, Alvah Bessie, Samuel Ornitz, Herbert Joseph Biberman, Edward Dmytryk, Adrian Scott, Ring Lardner, Jr., and Lester Cole. These men are prominent writers and directors of the motion picture industry in Hollywood. In October, 1947, they appeared before the House Committee on Un-American Activities in response to subpoenas served upon them. They were sworn and testified. Except for some routine preliminary questions (name, address, occupation), the only two inquiries addressed to

these persons were, first, whether they were members of a specified trade union, and second, whether they were, or had ever been, members of a specified political party. The witnesses asserted that the Committee was without constitutional authority to compel the disclosure under oath of a person's trade union and political affiliations because the inquiries invaded the area of conscience and belief. Despite such assertions these persons have been cited by the House of Representatives for contempt of the Committee and indictments charging refusal to answer the questions concerning trade union and political affiliation.

The Committee on Un-American Activities, once a special committee of the House of Representatives, and now a standing committee with permanent pervasive influence, has been empowered by law, at least according to the Committee's interpretation and application of the law, to "investigate," with the aid of compulsory process, every idea of social, economic and political change, and every person and organization in America who espouse such ideas. The Committee has construed their power as extending to "any activities of any organization or any individual". *Hearings on Communists 1945, p. 31; Hearings of Committee, Vol. 4, p. 2996.* Such an inquisition has heretofore been unknown to our Constitution. Indeed, it has often been stated that the Bill of Rights was included in our fundamental law to make certain that the inquisition of the Middle Ages, the Star Chamber and the Salem witchcraft hysteria would never appear on the American scene. (See, *Elliot's Debates on the Federal Constitution* (Phil., 1836), 2d. Ed., Vol. III, p. 447; *West Virginia State Board of Education* v. *Barrette,* 319 U. S. 624, 636 (1943).)

We do not believe that this Court, the supreme interpreters of the Constitution, will permit such a governmental inquisition to endure. On behalf of all citizens and artists who value intellectual freedom, we urge the Court to grant the application of the petitioners in the above entitled pro-

ceeding so that one of the most momentous issues ever to come before the Court may be fully presented and argued.

We ask leave to file the annexed brief in support of petitioners' application for a writ of certiorari. We have filed with the Clerk of this Court the written consent of the counsel for petitioners and respondent.

The brief touches only upon a few salient features which mark the importance of this proceeding. Words alone, however, cannot portray the grave danger which the Committee represents to our free institutions. Judge Edgerton in the Court below rightfully stated: "The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak."

It is imperative, we respectfully submit, that the validity of the Committee on Un-American Activities be adjudicated by this Court. The fate of our democratic institutions rests to a large extent upon that determination.

BRIEF OF AMICI CURIAE.

ARGUMENT.

I.

The Committee in Operation and Effect Abridges Freedom of Opinion and Belief.

We desire to give this Court a single example of how the Committee construes and applies its powers in action. We wish to show the Court how this Committee construes its statutory authority. We emphasize that this is only one glimpse behind the curtain. The complete picture must await the full argument before this Court.

On October 20, 21, 22, 23, 24, 27, 28, 29, and 30, 1947, the House Committee on Un-American Activities conducted an inquiry into the motion picture industry (*Hearings before the Committee, Hearings regarding the Communist Infiltration of the motion picture industry*—hereinafter referred to as Hearings). In the first week of the hearings, there appeared before the Committee many of the leading producers in the industry. There was one line of questions assiduously pursued by every member of the Committee present and its chief investigator.

> "Mr. Vail. I would like to get one or two specific answers from Mr. Warner.
>
> Touching again upon the association, you are a very responsible executive in the motion-picture industry, Mr. Warner. You are thrown into an association, in this organization, with other executives of the industry.
>
> Now, we have touched upon the writers that were dismissed. But we all have knowledge of a large number of actors who are generally known to have communistic sympathies and are contributors to the Communist war chest. It would seem to me that your organization would recognize the fact that the American people are not interested in viewing the pictures in which actors appear who have communistic leanings. It would seem to me that this organization should concern itself with cleaning house in its own industry.
>
> You pointed out what the organization was not organized for, but you didn't touch upon the reason, the actual reason or reasons, for its existence. I take it for granted that the reason is the betterment and the improvement of the industry. I don't think that you can improve the industry to any greater degree and in any better direction than through the elimination of the writers and the actors to whom definite communistic leanings can be traced.
>
> Don't you agree to that, Mr. Warner?"
>
> *Hearings*, pp. 52, 53.

The chief investigator put it this way:

> "Mr. Stripling. Don't you think the most effective way of removing these Communist influences—and I

say Communist influences; I am not saying Communists; I am not accusing them all of being Communists—but don't you think the most effective way is the payroll route? In other words, if the owners and producers cut these people off the payroll it would eliminate it much quicker than a congressional committee or crusades and so forth."

Hearings, pp. 49, 50.

Here is another view:

"Mr. Nixon. Getting down to specific cases as to what the industry should do—

Mr. Menjou. Yes, sir.

Mr. Nixon. To rid itself of un-American activities in Hollywood if, for example, a producer were to be given unequivocal proof that one of his star actors was a member of the Communist Party do you believe that that producer has the responsibility as an American not to renew that person's contract?"

Hearings, p. 105.

Here are the last words of the Chairman of the Committee as the hearings closed ("the committee is not adjourning *sine die*"):

"It is not necessary for the Chair to emphasize the harm which the motion-picture industry suffers from the presence within its ranks of known Communists who do not have the best interests of the United States at heart. The industry should set about immediately to clean its own house and not wait for public opinion to force it to do so."

Hearings, p. 522.

In order that there should be no doubt about the exact meaning of these last words spoken by the Chairman, Mr. Thomas insisted upon being even more precise in the course of a deposition which was taken during the trial of Dalton Trumbo, one of the ten Hollywood writers and directors.

The following are the questions on this subject put to Mr. Thomas and his answers:

> "Q. Did you ever call upon the Hollywood motion picture producers to clean out their house?
> A. Yes; many times, just as I would call upon any other industry that had Communists in it, to clean their house.
> Q. By that you mean, sir, to have them discharged from their jobs?
> A. Exactly."

A mere reading of the few examples cited above, taken from the official transcript of the Hollywood hearings, will assist the Court in understanding that a committee which is so unrestrained in its attempts to impose sanctions to effectuate the abridgement of opinions, beliefs and ideas would consider itself unlimited in defining the ideas which it seeks to abridge. For instance, the following are but a few examples of ideas and beliefs which the Committee has considered as "un-American propaganda activities" and as "subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution":

(1) To oppose monopolies (Report No. 592, June 16, 1947, p. 12);

(2) To attack "the Standard Oil Company of New Jersey and other responsible industrial organizations" (Report No. 2233, June 7, 1946, p. 35);

(3) To "viciously attack cartels" (Report No. 2233, June 7, 1946, p. 35);

(4) To say that landlords have high powered lawyers while tenants do not (Report No. 2233, June 7, 1946, p. 11; hearings on O. P. A., p. 80);

(5) To sign an open letter on behalf of Harry Bridges, (Report No. 1311, 78th Congress, 2nd Session, March 29, 1944, Report on P. A. C., p. 82);

(6) To have been the "brains" of the C. I. O. and to aid in its formation (Report No. 1311, March 29, 1944, p. 73).

The Hollywood hearings were conducted in the presence of a large audience, almost half of whom consisted of representatives of the press from all parts of the country, with all radio broadcasting systems present, and with lights specially adjusted for television facilities. Here indeed was a gigantic demonstration of the Committee's "exposure" technique aimed at character assassination and depriving persons of the opportunity to follow their calling and of the means to earn a livelihood.

The ten directors and writers here who appeared before the Committee from October 27 to October 30, 1947, became unemployed in the motion picture industry one month later (N. Y. Times, November 26, 1947, 1:2). The motion picture industry thus reversed its policy of non-discrimination because of political belief or association which it had adopted before the Committee hearings began. (Hearings, pp. 312-313). Those who were employed were discharged or suspended from their employment despite written agreements. By publicly announced policy, the motion picture producers have informed the world that nothing further is available to any of the ten in Hollywood.

II.

Under the Constitution, Belief and the Formulation of Belief Are Absolutely Free. The "Clear and Present Danger" Doctrine Is Not a Limitation Upon the First Amendment.

The importance of the issue raised on the present application to this Court is marked by a most profound consideration. The First Amendment, keystone of the Constitution, is in danger. This Court, it is respectfully submitted, has the constitutional duty to avoid that danger.

We assert that the First Amendment to the Constitution of the United States provides for all Americans, of all

faiths, of all races, and of all persuasion, the absolute right to think freely, that discussion of ideas, opinions and beliefs is unlimited. We point in support of our thesis, if proof be needed, to Magna Carta and the Petition of Rights; to John Milton and the "Areopagetica"; to Junius's celebrated letter to the King; to Wilkes, editor of the "North Briton" and the memorable issue number "45"; to Thomas Paine and "The Rights of Man"; to the Declaration of Independence; to the state ratifying conventions of 1787-1789; to Jefferson and Madison and the Kentucky and Virginia Resolutions of 1798; to Mill and the essay "On Liberty"; to Lincoln and the first inaugural address; to Brandeis; to Holmes; to Hughes; and to the myriad plain men and women of America, from Bunker Hill to Bastogne who laid down their lives "in freedom's cause."

Our present concern is not with the true meaning of the First Amendment. It is rather with the attempts now being made to carve out "exceptions" from that charter of liberty for the purported purpose, among others, of "preserving the government." Just as in the days of John Adams and the Federalists, we are now told that "this existing machinery of government has power to inquire into potential threats to itself, not alone for the selfish reason of self-protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself." Thus, the ancient practice of identifying despotic kings with the Divinity is replaced by the philosophical notion that officials of government are the same as the people, and no dissent may be tolerated lest the people, and officials of government, be endangered. This is a curious and dangerous blurring of historical truth. James Madison had a different view:

> "In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroach-

ments are regarded as possible from one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws."

Report on the Virginia Resolution (1800)
In *Elliot's Debates on the Federal Constitution* (Phil., 1836), 2d Ed. Vol. IV, p. 569.

Another device for circumventing the provisions of the First Amendment is to use the "clear and present danger" rule as a means of punishing speech and opinion—as if that "rule of reason" had completely replaced by judicial fiat the provisions of the First Amendment. Thus, the Court below, treating the rule as equivalent to the First Amendment, sweeps it aside as inapplicable to governmental action involving compulsory disclosure of beliefs and associations, and permits the infringement of these freedoms "when danger is reasonably represented as potential." Even those who punished "seditious libel" and "constructive treason" left more freedom for their victims.

Moreover, we deal here with a statutory enactment, Public Law No. 601. This, the Court below appears to have overlooked, treating the inquiry as something different from legislative measures. In this area of legislative enactments which restrict speech there is a developing attitude in the Courts to stretch the "clear and present danger" rule to a point where the "bad tendency" rule of the 1920's is reached. This is another variation of the attempt to circumvent and supersede the provisions of the First Amendment.

The "clear and present danger" doctrine was enunciated by Mr. Justice Holmes for this Court in *Schenck* v. *United States,* 249 U. S. 47 (1919). We do not believe that the promulgation of this rule by Mr. Justice Holmes was ever intended to replace, or limit, the broad scope of the First Amendment. Certainly, his numerous dissenting opinions

together with those of Mr. Justice Brandeis which followed soon after the decision in the Schenck case, indicated that he had no such purpose.

We believe that the "clear and present danger" test is a rule which can be applied only in the realm of conduct. Thought and expression of thought are free—absolutely free. Only in the domain of conduct may governmental power impinge, and then only if the circumstances are such as to create a clear, serious, and imminent danger that the conduct will directly and intentionally bring about the substantive evil that Congress has a right to prevent. It is a question of proximity and degree of unlawful conduct—a question to be decided by fixed principle of the criminal law (See, Holmes, *The Common Law* (1881), pp. 54, 68), and not by the unfettered judgment of officials of government or the legislature.

III.

The Committee Has Consistently Functioned in Such a Manner as to Deny Witnesses Before It Due Process of Law as Guaranteed by the Fifth Amendment to the Constitution.

A review of the Committee's actions will reveal that since its inception it has utilized its powers to attempt to impose, and to actually impose, sanctions upon persons appearing before it. Not only has the Committee openly asserted that its purposes are to "expose" and through "exposure" to destroy the reputations and ability to function publicly of organizations and persons, but it has directly sought to secure the discharge and blacklisting of individuals. An example of the latter aim has been cited above. As for destruction through "exposure," one example of "credit" claimed by the Committee relates to what it calls the "People's Front":

> "It is the way of exposure—a way which conforms to the letter and the spirit of a democracy, and is at the same time more effective than a Gestapo.

> In like manner, the committee had a large part in breaking up the People's Front. This was more difficult than the breaking up of the Nazi Front. The People's Front was composed of several million adherents and scores of organizations which bore high-sounding names. The People's Front exercised real political influence." (Report No. 1, 77th Congress, 1st Session, January 3, 1941, pp. 21, 23, 24).

The extent of the Committee's activities as a "democratic" substitute for the Gestapo is indicated by the following:

> "In 1938, only two file cabinets were required to hold the files of this committee, whereas today the committee's files and records on subversive activities fill 135 file cabinets. The index to these files contains over 1,000,000 cards, each containing information in indivduals and organizations engaged in subversive activities." (Report No. 2748, 77th Congress, 2nd Session, January 2, 1943, pp. 2, 3).

That the Committee has thus sought to impose sanctions upon individuals and groups upon a scale unprecedented in American history is not subject to doubt.

These facts, complete documentation of which the undersigned are prepared to submit to the Court if the writ herein is granted, raise most serious constitution questions. The Committee by holding hearings with the purpose and effect of imposing sanctions is performing a judicial function, thereby violating the separating of powers doctrine, (*Kilbourne* v. *Thompson,* 103 U. S., 168; *O'Donghue* v. *United States,* 289 U. S. 56; *Humphreys Executors* v. *United States,* 295 U. S. 602), and denying due process of law to the individuals and organizations damaged by the arbitrary action of the Committee. *Kilbourne* v. *Thompson,* 103, U. S. 168, 182; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370; *State* v. *Louisville & Nashville Ry. Co.,* 323 U. S. 192.

> ". . . the reach of the Amendment is shown to be co-extensive with any exercise by a state of power, in *what-*

> *ever form exerted.* . . . It presupposes the possibility of an abuse by a state official or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who in possession of state power *uses that power to the doing of the wrongs* which the Amendment forbids, even though the commission of the wrong may not be within the powers possessed, *if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrong doer.*" *Home Telephone & Telegraph Co.* v. *City of Los Angeles* (1913) 227 U. S. 278, 57 L. ed. 510, 515; emphasis added.

As to the individual or organization affected by the Committee's conduct, its action may be said to constitute a bill of attainder. *U. S.* v. *Lovett,* 328 U. S. 303.

Furthermore, the Committee denies to individuals the most fundamental requirements of procedural due process. It presents no charges, does not provide for confrontation of witnesses, does not permit cross-examination, denies the right of counsel and it takes action and issues its reports upon the basis of rumor, gossip, conclusions and the wildest kind of prejudiced evidence. Never in the history of this country has there been such a wholesale violation of all the basic concepts of due process, which must be afforded even in legislative inquiries which may directly affect the rights of individuals or organizations. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210; *Londoner* v. *Denver,* 210 U. S. 373; *Morgan* v. *U. S.,* 298 U. S. 468; *Morgan* v. *U. S.,* 304 U. S. 1.

The power of the Un-American Activities Committee to inflict penalties upon those whose ideas and activities fail to conform to its standards, and determination of the rights of individuals and organizations whose very life and existence are threatened by this Committee, present constitutional questions which go to the very root of our democratic processes.

CONCLUSION.

The issues raised in this application are of grave importance. We have touched only upon a few of the many involved herein. We urge the Court to grant petitioners' application, for the havoc wrought by lawless disregard of constitutional requirements cannot always be undone.

Respectfully submitted,

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